SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 515.

JOHN B. REYNOLDS, AS SOLE EXECUTOR OF LUCY FAYERWEATHER, DECEASED, APPELLANT,

against

THOMAS G. RITCH ET AL., APPELLEES.

REPLY BRIEF FOR SAID APPELLANT.

I.

The Right of Direct Appeal.

The second point of the three executors, appellees, page 43, reads thus:

"This suit is not one which involves the construction or application of the Constitution of the United States, within the meaning of the judiciary act of March 3, 1891, authorizing the taking of appeals, or writs of error, in such cases, from district or circuit courts of the United States, direct to the Supreme Court."

They rest chiefly upon Cosmopolitan Mining Co. *v.* Walsh, 193 U. S., 460, citing from it at length.

They then state their position thus:

"It is apparent that the substantial controversy which the case at bar presented, involved the mere determination of what was the law of the State *of New York* upon the subject."

But is that ALL that the present decision involves?
What does the *bill* allege?
That the judgment of the State supreme court is void;
Is fraudulent;
Contrary to the law OF THE LAND;
Beyond the jurisdiction of said court;
and in violation of complainants' right to due process of law, secured to them by the Fourteenth Amendment of the Constitution OF THE UNITED STATES;
and contrary to equity and good conscience.

Do you find anything here as to its being UNauthorized by the law OF NEW YORK?
As in the Walsh case by the law of Colorado?
It is silent as to any violation of the law OF NEW YORK.

So is the cross-bill.

It *expressly* raised, for the consideration of the circuit court, NOT the law OF NEW YORK;
But the Constitution OF THE UNITED STATES.
In the Walsh case the court says, page 472, that—

"The primary and fundamental contention of the mining company was, therefore, this, and nothing more:
"That under the circumstances disclosed, the service upon the statutory agent *was unauthorized*, either by the law *of Colorado*, or the principles of general law. And hence, that it had not lost its title to the property."

It is not only NOT *that* at bar "and nothing more," but much more.

Where does the bill say that this Truax judgment was UNauthorized by the law OF NEW YORK?

Or by the principles of general law?

And *hence* that the complainants have not lost their title to the property.

All the New York courts held that this judgment *was authorized* by the law *of New York;* that it *was valid.*

And they *affirmed* it.

Defendants quote these words from Judge Wallace, in the United States circuit court of appeals (vol. I, p. 103):

"By whatever process of reasoning the result was reached, it is plain, that, by the judgment *of the State court,* it *has been* determined that the fund, now in controversy, equitably vested in the various corporations, made legatees by the ninth clause of the will." * * *

In the Walsh case the grievance was one UNauthorized; *forbidden by* State law.

Hence not the act OF THE STATE.

Hence the circuit court could not proceed.

Because it is for *State* courts to remedy acts of its officers done *without* its authority.

Or *contrary to* the law of the State.

At bar it WAS the act OF THE STATE;

By its JUDICIAL department.

Not *un*authorized.

But AUTHORIZED.

Affirmed by *every* court of the State.

Nowhere stated *not* to have been authorized.

Thus stated in all the pleas, as in that of Hamilton college (vol. 1, p. 183), as follows:

"Thereupon the said Court of Appeals decided that *no error* had been committed, *in the decision of* the LOWER court."

And it is *this* act OF THE STATE OF NEW YORK which has deprived us of due process of law guaranteed us by the fourteenth amendment.

From the effect of which we here ask relief.

Reliance is placed by defendants upon Blythe *v.* Hinckley, 173 U. S., 501.

That held that a circuit court is not an appellate court from the highest court of a State.

No one doubts *that.*

Appellant had *had* due process there.
Law in its REGULAR administration.
A *trial* by the *trial* court.
Not a REFUSAL to try.
No apparent injustice was done.

Search that case through and see whether A's property was given to B WITHOUT compensation.

Or any other manifest *injustice* was done, against which the Constitution safeguards every citizen.

Search it a *second time*, and see if its bill even hints that probate decrees *were obtained by* fraud.

Search it a *third* time, and see if its bill anywhere suggests that a State court judgment therein *was obtained by* fraud.

Both said charges are in the bill at bar. *Either* would be *enough.*

For in U. S. *v.* Throckmorton, 98 U. S., 61, Justice Miller speaking for the court says, that there is "an ADMITTED EXCEPTION" to the rule of *res adjudicata*, and that is when a judgment *has been obtained by* fraud in the very fashion described at bar.

Page 105:

"The trial court held that the releases were without effect on the rights of the parties, and, even though *that decision* was erroneous, *it was final* between the parties, until *reversal*."

It has *never* been *reversed*.

II.

Did Judge Lacombe Try This Cause?

If the circuit court had *never* tried this cause, no one would claim that it *had* tried it.

When that court expressly states in its opinion that "IT IS CONSTRAINED" to decide as it does:

And in the same opinion makes it plain that it it *not* ITS decision:

But one it is FORCED by *another* court to make:

Is *that* due process of law?

Is it "law in its REGULAR administration"?

At what value is *such* an act nominally of a court?

But in fact NOT the act of that court:

But of that court turned into a mouthpiece, an unwilling mouthpiece *of somebody else?*

Of what value to parties, to the community, or to the cause of justice is work of *that* sort?

Is *that* "*due* process of law"?

III.

Have the Widow and Next of Kin Had Due Process?

HOVEY vs. ELLIOTT, 167 U. S., 446, WHITE, *J.*:

"There is NO distinction IN PRINCIPLE between determining a cause upon issues NOT raised BY THE PLEADINGS, and rendering a decree BY REFUSING to permit a party to BE HEARD in his defence, OR TO CONSIDER THE MERITS OF A SUFFICIENT DEFENCE."

417: Can it be doubted that DUE process of law SIGNIFIES A RIGHT to be HEARD in one's defense? * * *

418: Judgment WITHOUT citation AND OPPORTUNITY (to be HEARD) WANTS ALL the attributes of a JUDICIAL determination.

IT IS JUDICIAL USURPATION and OPPRESSION, and can NEVER be upheld where justice is JUSTLY administered.

418: The NECESSARY EFFECT OF the judgment of the supreme court of the District of Columbia was to decree that a portion of the award MADE IN FAVOR OF THE DEFENDANT—in other words, HIS property—BELONGED to the COMPLAINANTS in the cause. The decree, THEREFORE, AWARDED the PROPERTY of the defendant TO THE COMPLAINANT upon the HYPOTHESIS of fact that by contract the defendant HAD TRANSFERRED the right in or to this property to the complainant.

If the court HAS POWER TO DO THIS BY DENYING the RIGHT to be HEARD to the defendant, what plainer illustration COULD there be of TAKING PROPERTY of one and GIVING it to ANOTHER WITHOUT HEARING OR WITHOUT PROCESS OF LAW?"

Justice Truax has sworn, and it stands UNCONTRADICTED, That he did NOT CONSIDER the defense of the widow and

next of kin, viz: the issue as to the VALIDITY of the RELEASES.

If, as just seen,—

"There is NO distinction IN PRINCIPLE between determining a cause upon issues NOT raised by the pleadings;

and REFUSING * * * TO CONSIDER the MERITS of a SUFFICIENT DEFENCE:"

and such "REFUSAL * * * is JUDICIAL USURPATION and OPPRESSION,

and can NEVER be upheld where justice is JUSTLY ADMINISTERED,"

Why did not Justice Trunx's REFUSAL to CONSIDER that VALIDITY DEPRIVE the widow and next of kin of Daniel B. Fayerweather of their property WITHOUT DUE PROCESS OF LAW?

If your honors saw *your* property taken from you in THAT way;

Would you think that YOU had had DUE process of LAW?

If he HAD considered the claims of all, *that* would have been fair and just.

But HOW was it FAIR and JUST *to leave out of consideration entirely* the claims of the ONLY ones who OWN this property?

Defendants are confident that the "might have been litigated" theory includes this case.

But they point to *no* instance where that means anything more than neglect on the part OF A PARTY to take the step in question.

The REFUSAL of a court TO CONSIDER a defence was an act BEYOND the control OF A PARTY,

It was not the act or omission OF A PARTY,

But OF THE COURT ITSELF.

We urged this crucial issue as to the *validity*, all that we could.

But the court turned a deaf ear, and *declined to consider* it.

In such a case the law is thus laid down in

State *v.* Rusk, 23 Wis., 643:

"A question which was entirely overlooked by counsel, AND WHICH WAS NOT EVEN CONSIDERED by the court,—CAN HARDLY BE SAID TO HAVE BEEN SETTLED BY THE DECISION."

Hagar *v.* Reclamation District No. 8, 111 U. S., 708, FIELD, J.:

"It is sufficient to observe here that by DUE process of law IS MEANT one which, FOLLOWING the forms of law, is APPROPRIATE to the case, AND IS JUST TO THE PARTIES to be affected."

Was it JUST to these ladies to REFUSE to CONSIDER their defense?

When all the time THEY were the OWNERS of nearly $3,000,000,—to so IGNORE their endeavor to obtain their own as to DISMISS it as unworthy of CONSIDERATION?

The court continues:

"IT MUST BE pursued in the ORDINARY mode PRESCRIBED by LAW."

Since when was the plan in Amherst *v.* Ritch the ORDINARY mode?

Did your honors ever before hear of ONE instance where THAT "mode" was "pursued"?

How is it that defendants have omitted to point out ONE such instance?

We did, one akin to it, in Starr *v.* Stark, 2 Sawyer, where Judge Sawyer pertinently asked:

"Shall complainant NOW BE CUT OFF from procuring ADJUDICATION OF his RIGHTS, because, under SUCH circumstances, the court erroneously PREVENTED him from having it adjudicated BEFORE?"

Page 616: *Negligence of the party himself* is the *main* element OF THE PRINCIPLE UPON WHICH THE RULE IS FOUNDED.

Page 619: In the case *now* in hand *this element of negligence is wholly wanting.* The parties *did set up this cause of action* in connection with the one ultimately relied on, *and sought to have it determined,* BUT THE COURT *refused* TO PERMIT them to be joined; and *required the plaintiff to* elect one and *omit the other;* and this ruling must be presumed to have been obtained AT THE INSTANCE OF THE DEFENDANT Stark, as it was made *against the* protest of the plaintiffs duly taken and noted in the order itself.

Does it lie in Stark's mouth now, after procuring such a ruling AND *forcing* PLAINTIFFS *against their protest,* UNDER THE ORDER OF COURT, *to omit* one cause of action, to say that plaintiffs MIGHT HAVE litigated?"

This court continues in the HAGAR case:

"It MUST BE ADAPTED TO the END to be attained."

Was it so adapted when the trial judge REFUSED to have anything to do with it?

Again, Justice *Field* says (in Hagar):

"The clause in question MEANS that there can be NO PROCEEDING against life, liberty or PROPERTY, which MAY result in the DEPRIVATION OF either, WITHOUT the observance of those GENERAL rules established in our system of jurisprudence for the SECURITY OF PRIVATE RIGHTS."

Where is the "GENERAL rule" to be found which says that a trial court—*through its own error in not knowing what*

the law was—NEED NOT CONSIDER the merits of a SUFFICIENT defense?

In which branch of "our system of jurisprudence" is THIS rule located?

If he did not need TO CONSIDER the defence of THESE defendants,—

Why did he need to consider the defense of ANY defendants?

With three parties, and their claims, to choose between—in deciding who owned this residuary estate:—

How came he to leave out the OWNERS entirely:

And to give it to the *wrong* ones?

By what *authority* did he do this thing?

And who *gave* him this authority?

IV.

Fundamental Rights Cannot be Taken Away Without Due Process of Law.

Another passage in said brief for the executors may not be out of place here.

Page 42 they cite these words of this court in Barney v. City of New York, 193 U. S., 430, by PECKHAM, J.:

"If, *through its* courts, it (Louisiana) erred in deciding what the common law *was;* yet, IF NO FUNDAMENTAL and ABSOLUTELY ALL-IMPORTANT RIGHT were thereby DENIED, to an accused,—he still had due process of law; and cannot complain to this court regarding the error; assuming of course that the decision did not conflict with some specific provisions of the Federal Constitution."

Such "*fundamental* and *absolutely all-important* rights" have been frequently defined by this court.

The one now to be considered is when a State, by its judicial department, takes away his property from one private individual and *gives* it to another:

Not for an inadequate consideration, BUT WITHOUT ANY CONSIDERATION:

Whether SUCH act of a State was the DUE process of law, guaranteed by the fourteenth amendment of the Constitution of the United States.

Holden v. Hardy, 169 U. S., 389, Brown, J.:

"We do *not* wish, however, to be understood as holding that this power (of a *new* State to enter the Union with its traditions, laws and systems of administration *un*changed) is UNLIMITED. While the people of each State MAY doubtless adopt such systems of laws as best conform to their own traditions and customs, the people OF THE ENTIRE COUNTRY HAVE LAID DOWN in the Constitution of the United States CERTAIN FUNDAMENTAL PRINCIPLES, to which EACH member of the Union IS BOUND TO ACCEDE, AS A CONDITION OF ITS ADMISSION AS A STATE." * * *

This court has never attempted to DEFINE with precision the words "DUE process of law," nor is it necessary to do so in this case. *It is sufficient to say that there are certain immutable principles of justice,* WHICH INHERE IN the VERY *idea* OF FREE GOVERNMENT, WHICH NO MEMBER OF the UNION MAY DISREGARD: as that no man shall be *condemned* in his person *or property without* DUE notice, and an opportunity of BEING HEARD in his defence."

Logan v. U. S., 144 U. S., 288, Gray, J., cites Bradley, J., in U. S. *v.* Cruikshank, 1 Woods, 108, as follows:

"With regard to THOSE ACKNOWLEDGED RIGHTS of the citizen, WHICH FORM A PART OF HIS POLITICAL INHERITANCE DERIVED FROM THE MOTHER COUNTRY, and which were challenged AND VINDICATED BY CENTURIES OF STUBBORN RESISTANCE TO ARBITRARY POWER, THEY BELONG TO HIM AS HIS

BIRTHRIGHT; and it is the DUTY of the particular STATE of which he is a citizen, TO PROTECT and ENFORCE THEM; and TO DO NAUGHT TO DEPRIVE HIM of their FULL ENJOYMENT."

Caldwell v. Texas, 137 U. S., 697, Fuller, C. J.:

THE POWER of the State MUST BE EXERTED WITHIN THE LIMITS of THOSE PRINCIPLES; and its exertions can NOT BE SUSTAINED, WHEN SPECIAL, PARTIAL, AND ARBITRARY."

Hurtado *v.* California, 110 U. S., 535.

Campbell v. Evans, 45 N. Y., 358, Allen, J.:

" Property can *not* be *confiscated* by act of the legislature, *or taken from* THE RIGHTFUL OWNER, *without* A *forensic trial* AND JUDGMENT: a TRIAL by the ORDINARY MODES of JUDICIAL proceeding."

Taylor *v.* Porter, 4 Hill, 140.

Wynehawer *v.* People, 31 Con., 328.

Since when was a course like that of Justice Truax in Amhurst *v.* Ritch,—where he refused *to consider* or *to decide* the *chief* issued in the case,—a trial by the ORDINARY modes of JUDICIAL proceeding?

People v. O'Brien et al., 111 N. Y., 38, Ruger, Ch. J.:

"Judge Thompson said in Dash *v.* Van Vleeck (7 Johns, 427), 'IT IS *repugnant to the first principles of justice*, and the *equal* and *permanent security of rights*, TO TAKE BY LAW THE PROPERTY OF AN INDIVIDUAL WITHOUT HIS CONSENT, AND GIVE IT TO ANOTHER.'"

Monongahela Navigation Co. v. U. S., 148 U. S., 325, Brewer, J., says:

"And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court in *Boyd v. U. S., 116 U. S., 635:*

325: "ILLEGITIMATE and UNCONSTITUTIONAL PRACTICES GET THEIR FIRST FOOTING IN THIS WAY NAMELY—BY SILENT AP-

PROACHES and *slight* DEVIATIONS FROM *legal* MODES OF PROCEDURE. This CAN ONLY BE OBVIATED BY ADHERING TO THE RULE that constitutional provisions FOR THE SECURITY OF person and PROPERTY SHOULD BE *liberally* CONSTRUED. A CLOSE and LITERAL CONSTRUCTION *deprives* THEM OF *half* THEIR EFFICACY, and LEADS TO GRADUAL *depreciation of* THE RIGHT, AS IF IT CONSISTED MORE IN FORM THAN IN SUBSTANCE. IT IS THE DUTY OF COURTS TO BE WATCHFUL FOR THE CONSTITUTIONAL RIGHTS OF THE CITIZEN, AND AGAINST ANY STEALTHY ENCROACHMENTS THEREON.

"THEIR MOTTO SHOULD BE, OBSTA PRINCIPIIS" [WITHSTAND BEGINNINGS].

Hurtado v. California, 110 U. S., 527, *Matthews, J.*, citing Kent:

"It means law in its *regular* course of administration through courts. The good sense of mankind has settled down to this. That they (these words) *were intended* to secure the individual from the *arbitrary* exercise of the powers of government, *un*restrained by the *established principles of private right and distributive justice.*

The Roman Empire—the foundation of modern civilization—has given us that *fundamental* maxim of distributive justice, *suum cuique tribuere.* They (*these broad general maxims* of liberty and *justice*) must be held *to guarantee* not particular *forms* of procedure, but *the very substance of individual rights* to life, liberty, *and property.*

The Law of the land in each State derives its authority from inherent and *reserved* powers of the State, *exerted within* the limits of *those fundamental principles* of liberty and justice, which lie *at the base* of all our civil and political institutions. Law must not be a special rule for a particular case, but in the language of Webster in his famous definition—

"The *general* law, which *hears* before it condemns, which proceeds *upon inquiry*, condemns and renders judgment only *after* trial."

So that every citizen should hold his * * * property under the protection of the *general* rules which govern society.

Due process *refers to* certain *fundamental rights* which that system of jurisprudence from which ours is a derivative, has always recognized. *If any of these* are *disregarded* in the proceedings, *then* the deprivation has *not* been by due process."

Harlan, J. (dissenting):

"Due process was intended to mean by the law of the land. There are principles of liberty and justice lying at the foundation of our civil and political institutions which *no State* can violate *consistently with* that due process of law required by the fourteenth amendment."

Long Island Water Supply Co. v. Brooklyn, 166 U. S., 695, *Brewer, J.:*

"Form is not the only thing essential to due process.

"Mere form of proceedings, even if he *was* admitted *to defend*, cannot convert the proceedings into due process, *if* the necessary *result* be *to deprive* him of his property *without compensation.*"

How much "*compensation*" did the widow of Daniel B. Fayerweather and his next of kin get for parting with $2,500,000? NOT ONE CENT.

Walker v. Sauvinet, 92 U. S., 92, *Waite, Ch. J.:*

"The requirement is met if the trial is had according to the *settled* course of judicial proceedings. Due is process due according to the law of the land. This process in the States is regulated by the law of the State. *Our power over that law is only to determine* whether it is in conflict with *the supreme law of the land.* That is to say, with the Constitution, laws, &c., of the United States made in pursuance thereof."

Allen v. Ga., 166 U. S., 140, *Brown, J.:*

A party "*must have been deprived of one of those fundamental rights*, the observance of which *is indispensable* to the liberty of the citizens, to justify *our* interference."

Missouri Pacific R'way Co. v. Nebraska, 164 U. S., 417, *Gray, J.:*

"A State *taking private property without owner's consent for the private use of another, is not due process of law, and is a violation of the 14th amendment.*"

Is *not* trying the main issue "the SETTLED course of judicial proceedings" in New York? Ask Justice Peckham.

Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S., 231, *Harlan, J.:*

The fourteenth amendment applies to State *judicial* authorities.

Being admitted *to defend does not* meet it.

We have said, trial *according to* modes of procedure applicable to such a case; secured by laws operating on *all alike.* And not subjecting to arbitrary power of government, *unrestrained* by the *established principles* of private *right* and *distributive justice.* * * *

If compensation for private property taken for *public* use is an essential element of due process, a *judgment* is the *State's* act within the meaning of the amendment.

Due protection of the rights *of property* has been regarded as a *vital* principle of republican institutions.

Brown on Constitutional Law says (228):

"The requirement that the property shall not be taken for public use, *without* just compensation, is but an affirmance of *a great doctrine* established by the common law for the protection of private property. It *is founded in natural equity*, and is laid down by jurists as a principle of *universal* law. Indeed in a free government, almost *all other rights would be-*

come worthless, if the Government possessed an uncontrollable power over the *private property of every citizen.*"

The prohibition of the amendment refers to *all* State instrumentalities. Hence whoever, by virtue of public position, in State, deprives, violates. *His is the act of the State. This must be so or the amendment would have no meaning,* and State has clothed its agents with power to *evade* it. These principles were enforced in Scott *v.* McNeal, 154 U. S., 34. Nor is denial of due process met by notice, and being admitted to defend.

No State may disregard the fourteenth amendment. Its courts may give fullest opportunity to be heard, and yet it might be that its final action would be *inconsistent with that* amendment. In determining what is due, regard must be *had to substance, not to form.* This court said: Can a State make anything due by declaring it so by legislation? If so the Constitution has no application, where *invasion of private rights* is effected under the forms of State legislation. Davidson *v.* N. O., 96 U. S., 97. The same as to judicial proceedings—inconsistent with requirements of due process.

Due *means therefore,* such as recognizes the *right* of the owner *to be compensated* if his property is *wrested from* him and transferred to the public. Mere *form,* even if he be admitted to defend, *cannot* convert the process used into due process of law, *if the necessary result be to deprive him of* his *property without compensation.*

The legislature may prescribe *a form of* procedure, to be observed in the taking of private property for public use; "*but it is not due process of law if provision be not made for compensation.*"

What "provision was made for compensation" of these ladies, when wresting from them $2,500,000, in the manner seen in this case?

Was Judge Wheeler wide of the mark when he said (I 92):

"As the proceedings went forward the special term decided the case upon a ground which did *not* involve the determination of this issue of fraud in the procurement of the releases, and *that court* APPEARS NOT TO HAVE, IN ANY WAY PASSED, IN ANY MANNER, UPON THE QUESTION?"

"Notice to the owner to appear in some judicial tribunal and show cause why his property should not be taken for public use, *without compensation, would be a mockery of justice.*

Due process of law, as applied to *judicial* proceedings instituted for the taking of private property for public use, *means*, therefore, such process *as recognizes the right* of the owner *to be compensated*, if his property *is wrested from* him, and transferred to the public.

The mere *form* of the proceedings instituted against the owner—even if he be admitted *to defend*—cannot convert the process used into due process of law, *if* the necessary *result* be to deprive him of his property *without* compensation.

237: In Loan Asso'n *v.* Topeka, 20 Wall., 603, Mr. Justice *Miller* delivering the judgment of this court, after observing that THERE WERE *private rights* in EVERY FREE government *beyond the control of the State*, and that a government, by *whatever name* it was called, under which the property of the citizens was at the *absolute* disposition and UNLIMITED control of ANY depository of power, WAS, AFTER ALL, BUT A *despotism*, said:

"*The theory of our governments*, State and National, IS OPPOSED TO the deposit of *un*LIMITED POWER ANYWHERE. The executive, the legislative, and the *judicial* branches of these governments are all of LIMITED and DEFINED powers."

There are limitations on such power which grow out of the ESSENTIAL nature of ALL governments, IMPLIED RESERVATIONS of INDIVIDUAL RIGHTS, WITHOUT which the SOCIAL

COMPACT COULD NOT EXIST, and which are respected by ALL governments entitled to the name.

No court, he said, WOULD HESITATE TO ADJUDGE VOID any statute declaring that—

"THE HOMESTEAD NOW OWNED BY A. SHOULD NO LONGER BE HIS; BUT SHOULD HENCEFORTH BE the property of B."

How about, "not its legislative, but its *judicial* department," declaring that NOT "the *homestead* now owned by A" (which may have cost $2,500, but the heritage of Mr. Fayerweather's widow and next of kin, of *not* $2,500, but a *thousand times* $2,500), should no longer be his (theirs), but should henceforth be the property of "twenty colleges," many of which it is doubtful if these ladies ever even *heard of*?

Just wherein lies the difference in *principle* between the *small* transaction and the *great* one?

If "no courts would hesitate to adjudge VOID" *such* a transfer of *the one*, why should it hesitate as to *the other*?

V.

Landon v. Fayerweather.

Defendants try to make capital out of Landon *v.* Fayerweather.

As Landon was assignee of a *donee* under the deed of "gift;"

And all donees *have had* ALL THEIR issues *considered* and *determined;*

Wherein is that decision a precedent or authority as to the interests *of the widow and kin*,—whose *chief* issue apparently REMAINS UNDETERMINED BY ANY COURT UNTO THIS DAY?

How came *such* an instance of straw-clutching in their brief?

A case so well understood BY THEM?

VI.

When Pleas are Also False—There Should be Judgment for Complainants—For the Relief is Demanded in the Bill.

If the pleas are DISproved there should be a decree in favor of the complainants for the relief demanded in the bill, and for the cross-complainant.

Equity rule 34 applies when a plea has been OVERRULED. Nor when it has been DISproved.

It reads thus:

Equity rule 34 reads thus:

"If, upon the hearing, any demurrer OR PLEA is OVERRULED, the plaintiff shall be entitled to his costs up to that period. * * *

"And, upon the OVERRULING of any PLEA or demurrer, the defendant SHALL BE assigned to ANSWER the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done, in default whereof the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly."

OVERRULE—Black's Law Dictionary: "To supersede; annul; reject by subsequent action or decision."

"A judicial decision is said to be *overruled*, when a later decision, rendered by the SAME court, or by a superior court, IN THE SAME SYSTEM, expresses a judgment as to THE SAME question OF LAW, directly opposite to that which was before given, thereby depriving the entire opinion of all authority as a precedent."

Counsel for the executors, to meet Kennedy *v.* Creswell, 101 U. S. (Cross-complainant's Brief herein, page 521), cite—

Stead *v.* Course, 4 Cranch, 413.

Farley *v.* Kitson, 120 U. S., 303.

Dalzell *v.* Dueber Watch Case Mfg. Co., 149 U. S., 315.

14: In the *Stead* case there was not ENOUGH proof for the Supreme Court to decide that fraud should BE PRESUMED. Hence it did NOT decide what it was not sure of—but sent it back for *more* proof, upon answer and replication below.

In other words, so far, the fraud was "NOT PROVEN."

It was not proved that there WAS fraud.

It was not proved that there was NOT fraud.

So, as the proof decided nothing either way and the work was hence left *un*finished and in such a condition that the Supreme Court could NOT YET dispose of it, they sent it back to supply the OMITTED proof.

The Stead case was not one where the plea was found FALSE,

And so clearly that *no more* proof was needed.

If it had been, what was the use of sending it back for *more* proof?

The Supreme Court of the U. S. itself answers thus:

"ENOUGH does *not* appear to ENABLE THE COURT TO DECIDE."

Instead then of its the Stead case being the USUAL case, where enough *does* appear TO ENABLE THE COURT TO DECIDE, the court expressly states that ENOUGH does *not* so appear. The proof was defective. It would not justify a decision for either party. So far the falsity was "not proven." Sending it back might *supply* the *omitted* proof.—So it went back.

By the usual machinery for getting at *the rest* of the proof, namely,—an answer: And the proofs make it.

It did so—NOT because the case WAS ALREADY PROVED, and the plea conclusively found to be FALSE.

BUT because it was *short of* sufficient proof. So far it was "*not* proven" and the court thought that, upon further inquiry, *that* proof might be forthcoming. If it did come, *then* a final decision could be reached. If it did not come, then also a decision could be reached.

Under such circumstances, was not sending back a reasonable, judicious step,—apt to finally bring to trial the case upon its MERITS?

In the DALZELL case the court say that

"THE CONTRACT HAS NOT BEEN SO CLEARLY AND SATISFACTORILY PROVED as to justify a decree for specific performance of it."

Had the contract been PROVED? No.

Had it been DISPROVED? No.

It was a case of "NOT PROVEN."

It had, as the court say, "NOT been so clearly and satisfactorily proved as to justify a decree for specific performance of it."

In other words, the proof WAS DEFECTIVE. And the sane and natural course was to grant an opportunity to supply the defect.

So they sent it back FOR THAT PURPOSE.

Had there been *no defect of proof*, would they have sent it back? The Dalzell decision could *well* cite the Stead case to justify *that* course. For the situation in the two cases *was alike*. Neither of them—as said in the Dalzell case—had been "SO CLEARLY AND SATISFACTORILY PROVED," OR SO clearly and satisfactorily DISPROVED, as to justify a decree.

EACH, so far, was merely NOT proven. The court could not yet be sure which side was right.

For it *could* tell.

And it *did* tell.

It decided—*not* that the plea was DISPROVED. But that it was NOT proved.

The court could not yet be sure *which* side was right.

So both were sent back for the missing proof,—or at least, to give a chance to supply it,—if it existed.

The Farley case went upon a *different* principle.

The single question there was "*notice*,"—as to whether sufficient notice had been proved.

The court says that it was DISPROVED.

Hence it was not a case, so far, of NOT proven.

Which therefore ought to be sent back for the deciding *omitted* proof, if there *was* any.

Or where the court could tell, from the proof already in, *which* way to decide.

So, in this respect, it was *not* like either the *Stead* or the Dalzell case.

Nor was the Stead case cited as authority for it.

And, of course, the Dalzell case was not, for it had not yet been decided.

Then why was the Farley case sent back?

The plea was in THREE parts.

Part ONE merely quoted recitals of the bill.

Hence it was not a demurrer, answer, plea, or any pleading at all, and so raised NO question.

Part TWO simply DENIED notice.

As notice was clearly and fully set forth in the bill, a denial of it is NOT A PLEA.

It is an answer—is part of the province of an answer. Had it accompanied a plea as a supporting answer, it would have been good pleading.

Part THREE charged that complainant's profiting out of his trust relation was illegal.

But, in the words of the court, "The averments in the THIRD part of the plea * * * were averments of pure matter OF LAW arising upon the plaintiff's case, as stated in the bill, and therefore a proper subject OF DEMURRER, and NOT to be availed of by PLEA."

So that part ONE was NOT a pleading at all.

Hence it needed no attention.

Part TWO was an ANSWER, but NOT a PLEA and supported no plea.

And part THREE was a DEMURRER.

The pleader had so mistaken the office of what he had called a plea. So Justice Gray—with the courtesy innate in him—devoted considerable space to defining what a plea IS and what it IS NOT, and with his customary clearness.

But the averments that this agreement was unlawful and void were in what the court designates as the THIRD part of the plea. And of them it says that they "were averments of PURE MATTER OF LAW, arising upon the plaintiff's case, as stated in the bill, and affecting the equity of the bill, AND THEREFORE A PROPER SUBJECT OF DEMURRER and NOT to be availed of by PLEA."

And the lower court sustained it.

But instead of answering then they came up, and the demurrer was overruled, and they were finally sent back for the answer they should have had in the court below long before.

In commenting upon this the court says in Earll *v.* Metropolitan Street Railway Co., 87 Fed., 529, WHEELER, J.:

"In Kennedy *v.* Creswell, 101 U. S., 641, the authorities were reviewed by Mr. Justice Bradley, AND A DECREE IN CHIEF, founded upon a finding of an issue of FACT, joined by traverse of a PLEA in favor of the plaintiff, WAS AFFIRMED. That would, of course, be sufficient authority for a decree in chief here for relief against that infringement.

But Farley *v.* Kittson, 120 U. S., 303, where the authorities, with the rules in equity, are again reviewed by Mr. Justice Gray, is cited and relied upon to the contrary.

The law of equity pleading is not here stated differently from that stated by Mr. Justice Bradley; but the decree, which was for the defendant, was reversed and the cause was remanded, with direction to overrule the plea and to order the defendants to answer the bill, and this direction is different from the decree affirmed in the former case. But in the latter case the plea was said to consist of three parts: First, a restatement in detail of some of the facts alleged generally in the bill. The issue of fact found for the plaintiff on a stipulation is said to have related to the first part of the plea, and the second and third parts were said to have been mere matters of law arising on the bill.

So the case stood somewhat as if the bill had been demurred to, or the plea had been set down for argument, whereby the part found would, in either way, have stood admitted. Thereupon the justice said that the question argued was not presented by the record, and that, "as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained and must be overruled and the defendants ordered, in accordance with the 34th rule in equity, to answer the bill."

The requirement to answer may have been made at the request of the plaintiff for further discovery as well as because of the form of the plea and the limited finding. This case does not overrule the former one expressly, and as here understood, does not so imply. In Elgin Wind-Power and Pump Co. *v.* Nichols, 65 Fed., 215, since both of these cases, a final decree in a cause on a patent founded on a finding for the plaintiff of an issue joined by traverse of a plea, was affirmed by the circuit court of appeals of the seventh circuit."

Elgin Co. v. Nichols, 65 Fed., 217 :

"The cause was heard on the pleadings (bill, plea, and replication) and proofs, and upon a finding that the pleas were NOT true a DECREE WAS ENTERED IN FAVOR OF THE COMPLAINANTS and a reference ordered to a master, who should ascertain and report an account of gains and profits. DECREE AFFIRMED."

It will thus be seen whether Kennedy *v.* Creswell, 101 U. S., 643 (see Main Brief, 521), does not stand undisturbed as the law of the present case if the pleas are DISPROVED.

When these 3 men thus procured from the widow and next of kin their withdrawals of objections to probate and their agreements to release ;

By *giving* them "gifts" OF THEIR OWN MONEY ;

By *suppressing* the proofs of the facts which would have shown that it was their own money, and that *not a dollar* of it belonged "*absolutely*" to said 3 men ;

When *they* knew *these* facts ;

And knew that these ladies did NOT know them ;

And by sworn *misrepresentations* that they 3 owned it *absolutely ;*

By threatening to fight this thing as long as there was a dollar left of this estate ;

By *withholding from* the widow EVERY dollar for nearly four months ;

And by forcing her TO BORROW MONEY UPON WHICH TO LIVE ;

When they knew that she was even then nearing death ;

Until *they* made *sure of* the withdrawal of her objections to probate of the codicil which gave *them* $3,500,000 "ABSOLUTELY ;"

And until they also made sure of her RELEASE. :

In THIS situation Mr. Bishop closes his brief by pointing out the heartfelt satisfaction, almost delight, it must have given to this lady to *then* take *ninety per cent. of her entire*

heritage and under SUCH circumstances to give it to the four Parsons institutions ;

And to the other "donees," selected not by *her* at all, but *by these three men*, as recipients of *her* property, of many if not most of which it is probable that *she had never even heard.*

The reason he assigns is that she *was* "*carrying out the wishes* OF THE TESTATOR."

As the *only* proof *she then had* of the wishes of her husband as to his residuary estate was that he had given it to these three men "ABSOLUTELY ;"

And as they did *not* disclose that he had NOT given it to them "*absolutely*" at all UNTIL MORE THAN TWO YEARS AFTER she WAS DEAD ;

Just *how* did she *know* WHAT THOSE WISHES WERE?

Mr. Bishop does not state ;
Neither does anyone else.

And as Mr. Bishop says that Mr. Fayerweather did NOT mean to give his residue TO THESE DONEES AT ALL ;

But always to THE TWENTY COLLEGES ;

Just HOW was she, as he says, "CARRYING OUT THE WISHES OF THE TESTATOR?"

Mr. Bishop is silent also upon THIS, and so is everyone else.

He says that there was danger that if she did not take this ten per cent. she would not get any.

So there WAS, *as far as they let her know.* She was vividly aware of THAT fact. The ONLY *cause* of that danger of which she knew, has been just seen.

Had these three men told her or her counsel the WHOLE *truth*,

HOW MUCH DANGER WOULD THERE HAVE BEEN THEN?

Mr. Bishop DEFENDS THIS way of wresting a widow's heritage from her, does he?

Again, he says that in case chapter 360 of the Laws of 1860 did NOT apply.

THEN that she would not get any.

But as both the appellate courts at once swept away all doubt, if anybody ever HAD any, that you cannot do indirectly what you cannot do directly,

And that *that* law DID apply,

Wherein lies the force of his suggestion?

He concludes thus:

"Under these circumstances, WITHOUT ANY MISREPRESENTATION OR CONCEALMENT of fact, or DURESS, OR OVERREACHING of ANY kind, but acting under the advice of most distinguished counsel, FULLY advised," he says:

"GROPING IN THE DARK."

THEY said:

"ALL the facts, by long and exhausting inquiry in the Surrogate's court; the settlement was made."

"And not only was there NO evidence which called for a finding of fraud or undue influence;

But there was NO evidence which would have sustained such a finding had one been made."

So complete an *endorsement of* this method of devouring widows' houses—BY MR. BISHOP—

Should have something said in reply. He HAS said it himself.

His words quoted above are from page 72 of his brief.

If he will turn the leaf, he will find upon page 71 *other* words OF HIS. They read *thus:*

"Counsel for these defendants HOLD NO BRIEF TO JUSTIFY THE CONDUCT OF THE EXECUTORS."

Even HE could not quite stomach THAT word.

He WAS willing, to be sure, *to receive the fruits of it.*

But the MANNER *of getting it* gave him concern.

COURTS have *no* difficulty in seeing such work,
In seeing *through* it,
In giving it the right label,
In saying how much title one gets to property gotten in THAT way; gotten AS THE TWENTY COLLEGES—Mr. Bishop's clients—HAVE GOTTEN THIS RESIDUARY ESTATE.

Huguenin *vs.* Basely, 14 Vesey Jr. Reports: The Lord Chancellor (ELDON): "I should regret, that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence, of others. The case of Bridgeman *vs.* Green is an express authority, that it is within the reach of the principle of this court to declare, that interests, so gained, by third persons, cannot possibly be held by them; and Lord Hardwicke observes justly, that, if a person could get out of the reach of the doctrine and principle of this court by *giving* interests to third persons, instead of reserving them to himself, it would be almost impossible *ever* to reach a case of fraud. In that instance therefore the interest of the son was considered capable of being affected by the decree as the interest of the father. The case afterwards came before the Lords Commissioners, and Lord Chief Justice Wilmot expresses himself thus:

"There is no pretence that Green's brother or his wife was party to any imposition or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money?

"NO; WHOEVER RECEIVES IT MUST TAKE IT TAINTED AND INFECTED WITH THE UNDUE INFLUENCE AND IMPOSITION OF THE PERSON PROCURING THE GIFT; HIS PARTITIONING AND CANTONING IT OUT AMONGST HIS RELATIONS AND FRIENDS WILL NOT PURIFY THE 'GIFT' AND PROTECT IT AGAINST THE EQUITY OF THE PERSON IMPOSED UPON. LET THE HAND RE-

CEIVING IT BE EVER SO CHASTE, YET IF IT COMES THROUGH A POLLUTED CHANNEL THE OBLIGATION OF RESTITUTION WILL FOLLOW IT."

The case of the 20 colleges is put by ex-U. S. District Judge Choate in his argument before the general term in Amherst *v.* Ritch, with his usual clearness.

He says:

"*The case of the 20 colleges is that Fayerweather intended and the 3 promised Nov. 15, 1890, to divide the residue among the 20.*

"*Nothing short of this* can avail the plaintiffs, *however it might avail the next of kin* or other parties."

See Clan Carty *v. id.* L. R., 31 Ir. Ch. Pr. Bank, 552, 558; *In re* Diggles, 39 Ch. Div. 253, 258."

As first seen, Mr. Bishop states that there was NO misrepresentation or concealment of any kind;

That Messrs. Coudert and Rollins were FULLY advised of ALL the facts when the settlement was made;

And that there was NO evidence of fraud or undue influence.

And Messrs. Putney and Bishop, who with Mr. Root were the chief representatives of the plaintiff Colleges in Amherst *v.* Ritch, in their brief before Justice Truax, page 79, say:

"If the devise to Ritch, Bulkley and Vaughan of the residuary estate to an amount exceeding one-half of the testator's estate WAS INVALID, BECAUSE IT WAS AN ATTEMPT TO EVADE THE ACT OF 1860 BY MEANS OF THE SECRET TRUST; THEN UNDER THE DECISION IN THE O'HARA CASE, THE RESIDUARY ESTATE IN EXCESS OF ONE-HALF, BELONGED BY RIGHT TO THE WIDOW AND NEXT OF KIN, AS BEING ASSETS UNDISPOSED OF BY THE WILL."

Whether *the probate of* this death-bed codicil WOULD HAVE BEEN IN GRAVE DANGER or not—this codicil, always bear in mind, upon which, as Judge Choate says, the title of the 20 colleges rested, your honors can infer from these words of Messrs. Putney and Bishop in said brief:

Page 56: "But, furthermore, *not one of these statements*, now put into the mouth of Mr. Fayerweather, *was testified to by Mr. Vaughan*, when he was examined *before the surrogate.*

Why not?

WAS IT BECAUSE OF THE FATAL EFFECT WHICH THIS TESTIMONY WOULD HAVE HAD UPON THE PROBATE OF THE LAST CODICIL?

Or is it now presented as an afterthought to avoid the trenchant force of Mr. Vaughan's own acts and declaration establishing the trust here insisted on?

Not only so, BUT THIS *envelope, Exhibit Oa*, WAS NOT PRODUCED BEFORE THE SURROGATE.

Why not?

WHAT EFFECT WOULD IT HAVE HAD UPON THE PROBATE OF THE CODICIL in that court?

Is this witness such a one in clearness of memory, *in frankness of disclosure*—so commended by the undenied testimony of his treatment of a lady who was a witness before the Surrogate—that upon the words which he repeats as falling from Mr. Fayerweather's lips when no one else was present, the promise of Mr. Ritch, written down over and over again, known to, acquiesced in, adopted by Vaughan, is to be destroyed?"

Is this what Mr. Bishop means by *no concealment?*

In obtaining probate of the codicil upon which *alone* the title of his clients—the 20 colleges—rests?

If the suppressed testimony might,—as he says,—have been "FATAL" *to the probate,*

What would have become of the title of the 20 colleges THEN?

He relies implicitly upon *Vaughan's* word as to what the fourth or next earlier or "*burned*" codicil did.

That it restored the residue to the status *in the will.*

But as *the will* gave *the residue* as well as the specific bequests of $2,100,000 to the twenty colleges.

HENCE WAS VOID ON ITS FACE as to all in excess of one-half of the net estate above the personal bequests.

Hence that excess, as Judge Choate says:

BELONGED TO THE NEXT OF KIN;

And as Mr. Bishop himself says above, if the residuary devise was invalid because it was an attempt *to evade* the laws of 1860.

"Then, under the decision in the O'Hara case, the residuary estate in excess of one-half, BELONGED BY RIGHT TO THE WIDOW AND NEXT OF KIN, as being assets UNdisposed of by the will."

Under THESE circumstances does Mr. Bishop still insist that there was no concealment, no misrepresentation, that Messrs. Coudert and Rollins were FULLY advised of ALL the facts?

How came he to say upon page 71 of his brief herein, that—

"the notion that Mrs. Fayerweather was in pecuniary want or distress at any time between the death of her husband on the 15th of November, 1890, and the date of the releases *is without support in the evidence?*"

(II. 572.) Her sister, Miss A. A. Joyce, testified thus:

"A. She had NO money.

"She had less than one hundred dollars by her when Mr. Fayerweather died. THERE WERE NO BILLS PAID UNTIL AFTER SHE SIGNED THE RELEASES."

(She meant the *agreements* to release.)

Mr. Fayerweather's funeral expenses, ALL the grocery bills for the servants, she BORROWED money of a friend to

pay her servants and SHE HAD NO MONEY TO PAY ANY BILLS,

She simply was living ON CREDIT."

There is no time to further set Mr. Bishop right.

We respectfully ask that these three defendants restore this residuary estate to its owners, with compound interest thereon, and with costs.

WILLIAM BLAIKIE,
Of Counsel for John B. Reynolds, as Sole Executor of Lucy Fayerweather, Deceased, Appellant.

OCTOBER 12TH, 1904.